No. 17-312

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Petitioner

v.

RENE SANCHEZ-GOMEZ, ET AL.,
Respondent

BRIEF FOR RESPONDENTS IN OPPOSITION TO UNITED STATES' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the appellate court had jurisdiction under the All Writs Act and whether a controversy still exists under the capable of repetition, yet evading review exception to mootness?

Whether a blanket policy of fully shackling every federal pretrial detainee, even the blind, injured and frail, at all non-jury court proceedings without an individualized determination of need violates due process?

LIST OF PARTIES

The four Respondents were appellants in the court of the appeals: Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Isabel Morales and Mark William Ring. Petitioner, the United States of America was the only appellee in the court of appeals.

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STATEMENT

For over 40 years, absent some identifiable risk of violence or escape, defendants came before the Southern District of California bar free from handcuffs, leg irons, and belly chains. In those 40 years, no member of the public, bar, or judiciary was ever harmed. No escape ever took place.

Despite this history, in October 2013, for the first time, all pretrial detainees—the young and the old, the halt and the lame, the blind and the pregnant—came to court in chains. Detainees making initial appearances before being released on their own recognizance were shackled. Detainees who had previously appeared peaceably and unrestrained were shackled. Those charged with a single misdemeanor and those charged with multiple felonies were alike shackled. Whether appearing for a brief proceeding or a lengthy motion hearing, all were shackled.

No in-court violence or attempted escape motivated this sea change. Rather, at a meeting with the Chief Judge, the Federal Defender, and the CJA Panel Representative, the Marshal explained that a national directive required all "prisoners" be brought to court "fully restrained," except for jury trials. He sought permission to follow this directive. The defense community opposed the change as unnecessary, inconsistent with the dignity and decorum appropriate to proceedings in federal court, and dehumanizing, not only to those chained but to all present.

Later, at a closed meeting of district judges, the marshal re-presented his request, focusing now not on the policy directive but instead on supposed security issues, the district's volume of court appearances, and understaffing. Three months later, the court acceded to this request, adopting the Marshals' policy as its own.

In form, the policy allowed "defendants in individual cases . . . [to] ask the judge to direct the restraints to be removed in whole or in part. In such cases it will be the duty of the District or Magistrate Judge to weigh all appropriate factors." ER260. In practice no weighing occurred, and the Marshals' national policy of bringing all detainees to court "fully restrained" was followed without exception. With no showing of need, defendants were treated not "with respect and dignity in a public courtroom," but "like a bear on a chain." Pet.App.21a.

Other than trial, a defendant might expect to have his handcuffs removed only when pleading guilty or perhaps at sentencing.[1] No evidentiary hearings were allowed. Sometimes, judges prohibited any objections. Federal Defenders of San Diego, Inc. challenged this regime. When those challenges failed, appeals to the district and circuit courts followed.

Federal Defenders is the community defender organization for its district. It staffs the district's initial appearances before every magistrate judge on every court day. It meets with all detainees in the Marshals' lockup. Arrestees come into

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[1] The new policy provided exceptions to shackling for those proceedings, but many judges simply allowed the marshals to shackle all defendants at all non-jury proceedings.

Marshals' custody only after being first screened by the MCC for health problems and gang affiliation, or other security problems and then strip-searched. ER286-87. Federal Defenders then interviews every detainee, assists each with financial affidavits, and prepares bail presentations.

On October 21, 2013, the first pretrial detainees entered court in five-point restraints, legs shackled and connected by a short chain, hands cuffed and connected to a belly-chain by a rigid metal tube. Counsel began to object but paused because one detainee could not hear and, with his hands bound to his waist, could not adjust the headset providing translation. After the headset was fixed, the attorney asked that all shackles be removed. She argued that due process barred the needless restraint of these individuals, no need was shown, and with two marshals and a court security officer present, no need existed. ER180-181,186.

The magistrate responded that the judges had met with the Marshal to consider this policy. She recited that the Marshal bore responsibility for courtroom security and worried he wasn't in compliance with national policy requiring full restraints, marshals transported many prisoners daily and were understaffed, the magistrate courtrooms were small and located on the first floor, prison-made weapons had been found in holding cells, and there had been assaults by prisoners in court and in holding cells. ER182-86. She claimed all this supported indiscriminate shackling.

Counsel challenged these claims and asked for an evidentiary hearing. The request was denied, the objection overruled. Aware that the Marshals' directive allowed defendants to appear unshackled when one marshal staffed the courtroom and one attended each defendant, counsel asked that defendants appear individually. Because magistrates save time by bringing six or more defendants into court, addressing them *en masse*, the magistrate denied this request. ER187-88.

The pattern was repeated throughout the day and over those that followed, before both this magistrate and others. Every defendant appeared in irons. Many had no criminal history. ER34-39. Most remained in custody, chained only because they lacked funds to post bond. On their behalf, Federal Defenders objected, the same "findings" were made without evidentiary hearings, and all objections to shackles were overruled. ER34-39.

Within days, magistrates refused to hear individualized objections. ER219, ER232-33. One announced that any defendant objecting to shackles would not be able to waive indictment but instead would have his case continued so the United States could indict. ER219. A defendant who does not waive indictment is ineligible for a favorable "fast track" plea agreement and will receive a longer sentence. The same magistrate announced that attorneys seeking individualized review of their clients' shackles should read "the record I made on Tuesday" because "I'm not going to go through this with every defendant." ER224.

Though the magistrates claimed they would hear objections based on physical infirmities, relief was rarely granted. A detainee cradling her fractured wrist requested her shackles be removed. The response: "Motions are denied for all of the prior reasons previously stated, ma'am, if your wrist is fractured, you need to tell a doctor at your prison about it." ER192.

Respondent Ring, a decorated veteran disabled from combat injuries suffered during four tours in Iraq, objected to shackles that caused him great pain. His lawyer explained Ring's infirmities: traumatic brain injury, chronic post-traumatic stress disorder, surgeries to both knees and one ankle, and cervical spinal fusion. She begged the magistrate: "He is actually crying at this point Your Honor, he is in pain." Though Ring was later offered a deferred prosecution agreement, the magistrate refused to remove his shackles. ER44-45.

A blind man entered court in shackles, one arm freed to hold his cane. He required the assistance of two marshals to navigate the courtroom. The magistrate refused to remove his shackles. ER198-200.

A woman with diabetes complained that shackles impaired blood flow to her hands. They were neither removed nor loosened. ER234.

Another woman explained she suffered from a thyroid condition causing her body to swell and resulting in discomfort from shackling. The magistrate responded: "There is absolutely no medical evidence in support of that argument." Counsel

asked to present evidence and was told: "No, you're not having an evidentiary hearing. End of argument." ER234-245.

A man asked that leg shackles be removed because they rubbed against a four-inch gash with exposed bone. Again, request denied. ER295.

In district court, defendants' objections met similar fates. A wheelchair-bound woman whose health was "dire and deteriorating" remained shackled despite objection. ER203-04. Later, the judge declared, "I don't have time to do an individualized analysis of whether or not their shackles should be removed today, counsel." ER243.

In another courtroom, a diminutive defendant appearing with counsel, but no other defendants, asked that his shackles be removed in the courtroom only, not in the holding cell. Counsel explained the shackles prevented him from even passing a note. ER251. But the judge refused "because the Marshals can't predict which of the guys in the tank might attack him. . . . He looks to me like he [is] likely to be a victim." ER251-53.

Defendants were humiliated, ashamed to appear before family and the public in chains. At least one told his family, who had religiously attended his hearings, to stop coming so they would not see him manacled. ER300.

One district judge informed by her 22 years of experience rejected the Marshals' policy, ordering that all defendants appear before her without shackles. ER677. No incidents, violent or other, resulted.

Respondents Sanchez-Gomez, Morales, and Patricio-Guzman were shackled in all proceedings after October 21, 2013. ER943-56. Respondent Ring had appeared twice in court without restraints and without incident but was still shackled under the new policy. ER57-63. Each objected. Those objections were overruled, and each appealed to the district court. Respondents challenged the refusal to remove their shackles and the district-wide policy on which refusal rested.

Each sought to recuse judges who had implemented the policy from deciding its legality, discovery concerning the claimed need for shackling, and an evidentiary hearing to resolve factual disputes. ER390, ER420, ER431. Respondents' motions were denied. ER67-69, ER126-35. Challenges to their individual shackling and the district-wide policy were overruled. ER124, ER148-49.

Respondents appealed to the Ninth Circuit, invoking collateral order jurisdiction, and challenged the district court's blanket policy of indiscriminate shackling. Respondents maintained that the policy violated due process, that the underlying support for this policy was predicated upon an incomplete and disputed record, and that the district judges improperly failed to recuse themselves. Petitioner agreed that collateral order jurisdiction existed, waived reliance on any disputed

facts, and argued that under circuit precedent, the indiscriminate shackling policy should be upheld.

A panel of the court of appeals vacated and remanded. It found collateral order jurisdiction existed and the matter was not moot because it was capable of repetition, yet evading review. It held the district had not sufficiently justified a policy posing so great a risk to defendants' Sixth Amendment rights and the dignity and decorum of the court. Pet.App.78a.

Petitioner sought rehearing *en banc*, arguing now that five-point shackling of all defendants in all non-jury proceedings was permissible under *Bell v. Wolfish*, 441 U.S. 520 (1979). And Petitioner resurrected previously abandoned factual claims, arguing that those disputed facts justified shackling. Finally, in a footnote, petitioner suggested the court "might revisit" whether the shackling rulings were appealable collateral orders. Though respondents were no longer detained, petitioner never claimed mootness.

Rehearing *en banc* was granted. At oral argument, petitioner conceded mandamus jurisdiction and agreed: "both sides ultimately would prefer the court reach the substance of this case."[2] The court did so.

The majority, Judge Kozinski writing, held the district's policy of shackling every pretrial detainee in every non-jury proceeding unconstitutional. Considering

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[2] See https://www.youtube.com/watch?v=9xz4L7OLf8Y at 43:37-44:04.

petitioner's jurisdictional challenge, the majority left undisturbed precedent holding that collateral order jurisdiction was proper to review individual shackling determinations. Pet.App.6a. But the majority considered supervisory mandamus more appropriate for reviewing respondents' claim that the district-wide policy denied them due process. Because the writ would not supplant the normal appeals process, the challenges raised important issues of constitutional law, and the error asserted was oft-repeated, mandamus was appropriate. Pet.App.8a (citing *Cheney v. U.S. Dist. Court for D. C.*, 542 U.S. 367, 380 (2004) and *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957)).

Because respondents' criminal cases had ended, the court considered whether a controversy existed. As neither party asserted mootness, neither had briefed this. Thus, the court was unaware that before the *en banc* proceedings, respondents Sanchez-Gomez and Patricio-Guzman had again appeared facing new charges of illegal reentry, a common occurrence in the Southern District of California. Unaware, the court declined to "presume" respondents would "be subject to criminal proceedings in the future." Pet.App.12a; Pet.App.39a.

The majority did not examine the question further because it found the case analogous to *Gerstein v. Pugh*, 420 U.S. 103 (1975). The district's detainees constituted a short-lived but ever-refilling class harmed by the broad policy, and most were represented by Federal Defenders. The claim was capable of repetition,

yet evading review. The writ could provide effectual relief so the case was not moot. Pet.App.16a (citing *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298 (2012)).

Turning to the merits, the court explained that "'[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause.'" Pet.App.17a (quoting *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). Under *Deck v. Missouri*, 544 U.S. 622 (2005), this encompasses the right to be free from shackles in the courtroom. Pet.App.17a . The court considered the right's underpinnings as identified in *Deck*:

> (1) the presumption that a defendant is innocent until proven guilty;
>
> (2) the Sixth Amendment right to counsel and participation in one's own defense; and
>
> (3) the dignity and decorum of the judicial process, including "the respectful treatment of defendants."

Pet.App.18a (quoting *Deck*, 544 U.S. at 630-31). Circuit precedent long predating *Deck* agreed. Pet.App.18a-19a. Considering the importance of these principles, the court found:

> This right to be free from unwarranted shackles no matter the proceeding respects our foundational principle that defendants are innocent until proven guilty. The principle isn't limited to juries or trial proceedings. It includes the perception of any person who may walk into a public courtroom, as well as those of the jury, the judge and court personnel. A presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.

Pet.App.21a. The court traced this rule's deep roots in the common law as set out in treatises by Coke, Blackstone, Hawkins, and other early commentators:

> "The prisoner is to be called to the bar by his name; and it is laid down in our an[c]ient books, that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons."

Pet.App.25a (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)). The court also considered *Deck*'s statement that this rule "did not apply at the time of arraignment." *Deck* addressed shackling not at arraignment but during the penalty phase of a capital trial, so the court construed *Deck*'s statement as dicta. Because original sources contradicted *Deck*'s statement, the court concluded it should not control this case. Pet.App.24a.

Finally, the court rejected Petitioner's argument that *Bell* controlled:

> *Bell* dealt with pretrial detention facilities, not courtrooms. Those facilities are meant to restrain and keep order, not dispense justice. They are a mere step away from detention in prison. We emphatically reject the idea that courtrooms are (or should be) perceived as places of restraint and punishment, or that courtrooms should be governed exclusively by the type of safety considerations that justify detention facility policies. We must make every reasonable effort to avoid the appearance that courts are merely the frontispiece of prisons.

Pet.App.28a-29a.

Dissenting, Judge Ikuta would have held that the cases were moot, that mandamus was improper, and that there was no reason to view the courtroom differently than the jail. Pet.App.32a-70a.

Judge Schroeder concurred to emphasize her disagreement with the dissent because it "ignores the degradation of human beings who stand before a court in chains without having been convicted . . . [of] any crime" and because it "accepts data provided by the Marshals Service even though no district court judge has ever made any finding of fact concerning the data's accuracy or whether it provides a good reason for this unprecedented mass shackling." Pet.App.31a.

REASONS TO DENY THE PETITION

Petitioner complains that the court of appeals "invented a new type of appellate jurisdiction" to issue a decision that is "causing serious, ongoing harm." This complaint is unfounded. The court appropriately invoked mandamus jurisdiction when Southern District judges surrendered the dignity and decorum of the courtroom to the Marshals' unnecessary and indiscriminate full-shackling policy. The court's holding that "if the government seeks to shackle a defendant, it must first justify the infringement with specific security needs as to that particular defendant" is compelled by due process, the common law, and this Court's decision in *Deck*. Petitioner's cries of "immense safety and administrative concerns" are exaggerated and misleading. The Court should deny the petition.

ARGUMENT

I. The Ninth Circuit had authority to issue a decision, and a controversy still exists.

Petitioner asserts the "threshold flaw in the decision below is that the Ninth Circuit lacked authority to issue it," "disregard[ing] both well-established limitations on interlocutory review and fundamental principles of mootness." Pet.13. But the court below properly invoked mandamus jurisdiction, and the case falls within the capable-of-repetition-yet-evading-review exception to mootness. Further, this case presents a poor vehicle to address petitioner's claims.

A. The All Writs Act provided jurisdiction for the decision below.

Mandamus jurisdiction is codified at 28 U.S.C. § 1651(a) and allows appellate courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This Act confers "discretionary power to issue writs of mandamus in . . . exceptional circumstances." *La Buy*, 352 U.S. at 260. The writ "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Kerr v. U.S. Dist. Court for N. Dist. of California*, 426 U.S. 394, 402 (1976) (quotation and citations omitted). But a writ "appropriately" issues "when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

This Court has "not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction.'" *Kerr*, 426 U.S. at 402. Instead, it recognizes a "power to review on a petition for mandamus" those "basic, undecided question[s]" related to the scope of a district court's power. *Schlagenhauf*, 379 U.S. at 110. The "function" of mandamus jurisdiction is to "determine the appropriate criteria" for district courts to employ "and then leave their application to the trial judge on remand." *Platt v. Minnesota Min. & Mfg. Co.*, 376 U.S. 240, 244-45 (1964). The Ninth Circuit's use of mandamus jurisdiction to determine "whether a district court's policy of routinely shackling all pretrial detainees in the courtroom is constitutional" fits well within this framework. See Pet.App.3a.

The district's shackling of every detainee at every pretrial proceeding presented an "exceptional case" involving the fundamental right to be free of unnecessary restraints and the maintenance of courtroom decorum and dignity. The case raised "new and important constitutional issues" that had not been "fully considered" by the Ninth Circuit. Pet.App.10a (citing *United States v. Brandau*, 578 F.3d 1064, 1065 (9th Cir. 2009)). And petitioner argues that respondents have no other way to challenge the policy. See Pet.13.

Similar circumstances supported mandamus jurisdiction in *Mallard v. United States District Court for the S. Dist. of Iowa*, 490 U.S. 296 (1989). There, the Court

found "the District Court plainly acted beyond its 'jurisdiction' as our decisions have interpreted that term, for, as we decide today, § 1915(d) does not authorize coercive appointments of counsel." *Id.* at 309. The Court noted that "Mallard had no alternative remedy available to him," and that "the principal reasons for our reluctance to condone use of the writ—the undesirability of making a district court judge a litigant and the inefficiency of piecemeal appellate litigation"—were not present. *Id.*

The same factors exist here: the court decided that the Constitution does not authorize in-court shackling without individualized need; respondents had no alternative remedy available; the district judge never became a litigant; and the consolidated proceedings did not result in piecemeal litigation. Accord *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 444 F.2d 651, 655-56 (6th Cir. 1971), aff'd, 407 U.S. 297 (1972) (mandamus jurisdiction appropriate in case involving "a basic issue which has never been decided at the appellate level by any court"); and *United States v. U.S. Dist. Court for E. Dist. of Mich. (Keith)*, 407 U.S. 297, 301 n.3 (1972) (approving circuit's exercise of mandamus jurisdiction).

Notably, petitioner does not claim that invocation of mandamus jurisdiction creates a conflict among the circuits. None exists; circuit courts frequently invoke mandamus jurisdiction to determine important undecided issues. See, e.g., *In re Sony BMG Music Entm't*, 564 F.3d 1, 4 (1st Cir. 2009); *United States v. Bertoli*, 994

F.2d 1002, 1005 (3d Cir. 1993); *In re Stone*, 986 F.2d 898, 901 (5th Cir. 1993); *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236-37 (10th Cir. 1986); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 526 (D.C. Cir. 1975).

Petitioner claims only that respondents did not carry "'the burden of showing that his right to issuance of the writ is clear and indisputable,'" and that the majority "did not identify any 'clear' error, 'judicial usurpation of power, or . . . clear abuse of discretion' by the district court." Pet.14 (quoting *Cheney*, 542 U.S. at 380-81). But, as *Mallard* and *Keith* show, mandamus jurisdiction is proper when the underlying question is subject to a debate resolved by issuance of the writ: *Mallard* resolved a circuit split, see 490 U.S. at 300, and *Keith* considered a split decision resolving a dispute among district courts. See *U.S. Dist. Court for E. Dist. of Mich.*, 444 F.2d at 656.

The question to be answered is whether, once the appellate court determines the scope of the district court's power, it is "clear and indisputable" that there has been a "usurpation of judicial power" or "clear abuse of discretion." Here, the answer is yes: the constitutional question having been resolved, it is clear that allowing the marshals to shackle every detainee with no showing of individual need is a usurpation of judicial power and a clear abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (holding "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law").

B. The case falls within the capable-of-repetition-yet-evading-review exception to mootness.

Petitioner also claims that "the case became moot when respondents' criminal proceedings concluded." Pet.14. The "usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). But a case is not moot when it "falls within a special category of disputes that are 'capable of repetition' while 'evading review.'" *Turner v. Rogers*, 564 U.S. 431, 439 (2011) (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911)). This exception applies when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Id.* at 439-40 (quotation omitted). Respondents' cases remain live under this exception.

Petitioner does not dispute that the pretrial proceedings at issue here are "too short to be fully litigated." *Id.* Instead, petitioner claims that the majority below "correctly recognized that respondents' individual claims did not qualify for the 'exception to mootness for disputes that are capable of repetition, yet evading review.'" Pet.15 (quoting *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011)). But the majority never examined whether there was a "reasonable expectation" that the respondents would again be subject to the disputed policy. Rather, it wrote: "we

cannot presume that defendants will be subject to criminal proceedings in the future." Pet.App.12a. In fact, whether there was a "reasonable likelihood" that these respondents will again be "subjected to the same action," *Turner*, 564 U.S. at 440, was never raised below: petitioner never claimed mootness until now, and the *en banc* court never sought briefing on whether respondents' release mooted the controversy.

Given the opportunity, respondents can show that there is more than a "reasonable likelihood" they will again be "subjected to the same action." The Court has observed that while "[p]retrial detention is by nature temporary," an "individual could nonetheless suffer repeated deprivations." *Gerstein*, 420 U.S. at 111 n.11. Indeed, during the course of this litigation, two respondents have: Returning to the Southern District of California on new criminal charges, Sanchez-Gomez and Patricio-Guzman were again subjected to unwarranted shackling. Sanchez-Gomez was arrested on illegal reentry charges and made appearances from July 6, 2015 to November 23, 2015. Patricio-Guzman returned on illegal reentry charges and made appearances between February 10, 2016 and March 14, 2016. Returning to federal court to face new charges is not unusual for individuals who reenter the United States after removal: the United States Sentencing Commission reports that 38.1% of illegal reentry offenders have previously been convicted of "at least" one prior illegal entry or reentry offense. United States Sentencing Commission, *Illegal*

Reentry Offenses 15 (2015). Thus, it is as likely that respondents will again face proceedings as it was that Turner would again be charged with contempt, *Turner*, 564 U.S. at 440; that Roe would again have an unwanted pregnancy, *Roe*, 410 U.S. at 125; that Kingdomware would again be involved in a contract dispute, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); and that Press-Enterprise would again be subject to a closure order. *Press-Enterprise Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 6 (1986).

But even if respondents could not show a reasonable expectation of being subjected to the same harm, the Court should still deny the petition. This Court has recognized the "flexible character of the Art. III mootness doctrine" and that "justiciability is not a legal concept with a fixed content or susceptible of scientific verification." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400–01 (1980) (quotation and citation omitted). Instead, the "justiciability doctrine is one of uncertain and shifting contours." *Id.* (quotation and brackets omitted). The Ninth Circuit's use of a "functional class action" rationale, Pet.App.13a-14a, fits within this "flexible character" of mootness. *Geraghty*, 445 U.S. at 400-01.

Moreover, the Ninth Circuit placed clear limitations on its "functional class action" analysis, ensuring its use only in the exceptional circumstances present in *Gerstein*: (1) the challenge must involve not only "individual violations, but also broader policies or practices;" (2) the case must "consist of continually changing

groups of injured individuals who would benefit from any relief the court renders;" and (3) the group must "have common representation, thereby guaranteeing that the cases will be zealously advocated even though the named individuals no longer have live interests in the case." Pet.App.14a. Because these prerequisites are grounded upon *Gerstein* and will rarely converge, there is no need to intervene. Indeed, these limitations have allowed exercise of jurisdiction in only three other instances. See *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1116-18 (9th Cir. 2003) (recognizing continuing controversy relating to challenged policy of state mental hospital in delaying admission of mentally incapacitated pretrial detainees); *United States v. Howard*, 480 F.3d 1005, 1009-11 (9th Cir. 2007) (recognizing continuing controversy in challenge to shackling policy at initial appearance); *Brandau*, 578 F.3d at 1067-71 (remanding for further fact finding relating to the question of mootness of pretrial shackling policy).

In essence, petitioner's argument boils down to a complaint about the Ninth Circuit's use of the words "functional class action." But the Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987). The majority's judgment that the case presented a live controversy was sound. The petition should be denied.

C. This case presents a poor vehicle to address mandamus jurisdiction.

This case presents a poor vehicle to address petitioner's claims of "invented" mandamus jurisdiction, Pet.12, because the Court's collateral order doctrine provides an alternative basis for jurisdiction. See generally *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Reviewable collateral orders must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citation omitted). Respondents' appeals meet those criteria.

The orders below "conclusively determined" that respondents would remain shackled. See Pet.App.99a.

The orders upholding the shackling policy were "completely separate" from the merits of respondents' cases. The criminal proceedings continued and concluded uninterrupted by the shackling appeal. And the shackling policy presented an "important issue:" it concerned the liberty interest of every pretrial detainee, as well as the public and defendants' interest in the dignity and decorum of federal courtrooms.

The orders were "final judgments" "effectively unreviewable on appeal." Because no shackling occurred at jury trials, there would be no prejudice to review

in appealing a criminal conviction. These indigent detainees also did not have the means to bring a civil action, nor would they attract civil attorneys willing to bring a class-action for them. And reviewing the shackling orders would not disserve the limiting principles that the final judgment rule was designed to protect—especially since the challenge has been brought by an organization appointed to protect the liberty interests of the indigent detainees.

The panel agreed that appellate jurisdiction was appropriate under the collateral order doctrine. See Pet.App.75a. The *en banc* majority left this ruling in place for individual shackling determinations but did not decide whether the doctrine allowed review of the district-wide shackling policy's constitutionality. Pet.App.6a-7a. Because an alternative jurisdictional basis exists, this case presents a poor vehicle to review the mandamus question.

II. The Ninth Circuit correctly held that shackling every pretrial detainee in every non-jury proceeding without any showing of need denies due process of law.

Petitioner asserts the court of appeals erred in holding that "application of physical restraints on a detainee in pretrial nonjury proceedings invariably requires an individualized justification." Pet.20. It asserts the court misinterpreted the common law and this Court's decision in *Deck*, Pet.21-22, and wrongly disregarded *Bell*. Petitioner is wrong. The Ninth Circuit correctly understood the common law,

decided the case within *Deck*'s framework, and properly concluded that *Bell* governs jails, not courtrooms.

Due process takes its meaning from "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). "The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common law procedures traditionally deemed necessary before depriving a person of life, liberty, or property." *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting). The common law required that the accused "be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (Philadelphia, Robert Bell ed., 1772) ("BLACKSTONE, COMMENTARIES") (citations omitted). This right is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21. An unbroken line of early commentators and caselaw confirms this.

Thirteenth century jurist, Henry de Bracton, set out the common law's limits on shackling in describing "[h]ow an arrested man ought to be brought before the justices": "When the person thus arrested is to be brought before the justices he ought not to be brought with his hands tied (though sometimes in leg-irons because of the danger of escape) lest he may seem constrained to submit to any form of trial."

2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 385 (George Woodbine ed., Samuel E. Thorne trans., 1968).[3]

Four centuries later, Sir Edward Coke confirmed the ancient right's endurance: "If felons come in Judgement to answer, &c. they shall be out of Irons, and all manner of Bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will." EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 34 (London, W. Rawlins ed., 6th ed. 1680) (citations omitted). A notation in the margin of the cited edition of Coke's Institutes clarified: "Note, Shackels [sic] about the feet ought not to be, but for fear of escape." *Id.* And Coke further explained that "[i]t is an abuse that Prisoners be charged with Irons, or put to any pain before they be attainted." *Id.* at 35.

Eighty years later, Blackstone confirmed the rule. In his chapter "Of Arraignment and it's Incidents," Blackstone states:

> To arraign, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment. The prisoner is to be called to the bar by his name; and it is laid down in our antient books, that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds;

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[3] Available at http://bracton.law.harvard.edu/Unframed/English/v2/385.htm#TITLE401.

> unless there be evident danger of an escape, and then he may be secured with irons.

BLACKSTONE, COMMENTARIES at 317 (footnotes omitted).

Blackstone's understanding is echoed by every other significant treatise. Sir William Hawkins, addressing "Of Arraignment in general," explained:

> *Sect.* 1. *First*, That every Person at the Time of his Arraignment, ought to be used with all the Humanity and Gentleness which is consistent with the Nature of the Thing, and under no other Terror or Uneasiness than what proceeds from a Sense of his Guilt, and the Misfortune of his present Circumstances; and therefore ought not to be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach: Nor even with Fetters on his Feet, unless there be some Danger of a Rescous or Escape.

2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 308 (London, E. Richardson and C. Lintot eds., 4th ed. 1762) (footnotes omitted).

Sir Matthew Hale, describing "How [the arraignment is] to be done or performed," explained:

> The prisoner, tho under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles or bonds . . . unless there be a danger of escape, and then they may be brought with irons. But *note* at this day they usually come with their shackles upon their legs for fear of an escape, but stand at the bar unbound, till they receive judgment.

2 MATTHEW HALE, HISTORIA PACITORUM CORONAE, THE HISTORY OF THE PLEAS OF THE CROWN 219 (London, Sollum Emlyn ed., 1736) (alteration in original) (citations and footnote omitted).[4]

Reported cases confirm the views and the authority of these treatises. See *The King v. Geary*, 1 Shower. K.B. 131-32 (1690) ("by the common law a man ought to be arraigned, for he may plead *misnomer*, or want of *addition*, and the like; and all the books, as Stamford, Coke, Hale, and the rest do all speak of arraignment as necessary, for according to Hale 212, a man at the time of his arraignment ought not to be in irons.") (alteration in the original).

Layer's Case, though relied upon by the dissent below, confirms the existence and application of the rule that defendants were not to be brought before the bar and forced to plead while in chains, unless presenting "evident danger of escape." BLACKSTONE, COMMENTARIES at 317. In 1722, Christopher Layer was arrested for plotting to overthrow King George I and imprisoned in the Tower of London. See The Trial of Christopher Layer, esq. at the King's-Bench, for High

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[4] In a footnote to this edition, the following observation is made: "By this it appears to have been our author's opinion, that upon whatever occasion a prisoner be brought into court, he ought not to stand there *in vinculis* till after his conviction, when he comes to receive judgment, not even at the time of his arraignment, (for that is the time our author is here discoursing of,). . . ." *Id.* at 219-20 n.(b).

Treason, Nov. 21: 9 GEORGE I A.D. 1722, in 16 THOMAS HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 94-322 (1812) ("*Layer's Case*"). Layer came to the bar to be arraigned in shackles and protested: "My lord, I am brought here in chains, in fetters and in chains. My lord, I have been used more like an Algerine captive than a free born Englishman." *Layer's Case* at 96.

The Attorney General explained that before being brought to the Tower, Layer had made an escape. *Id.* The Lord Chief Justice responded, "Alas! If there hath been an attempt to escape, there can be no pretension to complain of hardship he that hath attempted to an escape once, if true, ought to be secured in such a manner as to prevent his escaping a second time." *Id.* at 97-98. The Solicitor General clarified that Layer "not only made an attempt to escape, but actually escaped, got out of a window two pair of stairs high, and from thence over the water into Southwark." *Id.* at 98.

Still, Layer's counsel pressed the point, arguing the authorities requiring the prisoner to be free from shackles at the time of arraignment. *Id.* at 98-100. Finally denying the objection, the court responded:

> I do not think a man charged with high treason of this nature, can be said justly to be too well guarded, especially if it be true what hath been

> suggested, that he hath endeavoured to make his escape; *that will justify more than what the law allows in other cases*.

Id. at 101 (emphasis added). Layer had escaped, so, at arraignment, shackles were allowed. At trial, the prohibition on shackles more strictly applied, and they were struck off. *Id.* at 129. But the argument in *Layer's Case*, the authorities cited, the evidence of escape offered in response, and the court's ruling, simply do not support the view that common law permitted shackling at arraignment without a showing of need.

At most, early American legal commentators read the case as an exception to the common law, not the rule:

> In Layer's case . . . a distinction was taken between the time of arraignment and the time of trial, and the prisoner was obliged to stand at the bar in irons during his arraignment; but *the ruling in that case is at variance with the authority of all the expositors of the common law*.

FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE 461-62 n.4 (8th ed. 1880) (emphasis added). See also WM. HENRY MALONE, CRIMINAL BRIEFS 58 (North Carolina 1886) ("The defendant is to be brought to the bar without irons or shackles, unless there is danger of escape. In Layers' case, the prisoner was required to stand at the bar in irons during the *arraignment*, making a distinction between the time of the arraignment and the time of the trial. This is at variance with the common law.") (citations omitted) (alteration in original).

Practice in America followed the common law rule. John H. Surratt, charged with conspiracy in the assassination of President Lincoln, "was brought into court in irons" for his arraignment. *Arraignment of John H. Surrat—The Case of Sanford Conover*, N.Y. HERALD, Feb. 24, 1867, at 8. Before proceeding, the following exchange occurred:

> Mr. Merrick, of counsel for the prisoner, said—I would suggest to the Court that it would be scarcely consistent with the authority and dignity of this tribunal that the prisoner should be arraigned in manacles, and therefore ask that your Honor will have the manacles removed.
>
> Judge Lynch—Certainly. Let the manacles be removed, and let the prisoner come forward and hear the indictment.

Id. "The manacles were then removed, and the prisoner rose, and, accompanied by his counsel . . . walked to the front of the clerk's desk, and stood while the indictment was being read." *Id.*

Other accounts of arraignments in state and federal courts demonstrate the unquestioned acceptance of common law practice across the states through American history. See *How One of the Swindlers of This Gentleman Escaped from Captivity in Chicago*, Chi. Daily Trib., Dec. 17, 1873, at 7 ("Justice Daggett ordered the handcuffs taken off, as he could not allow a man to be arraigned before him with shackles on."); *Black White, The Murderer of Sheriff Beattie, of Crittenden County, Safely Lodged in Crittenden County Jail*, Memphis Daily App., May 1, 1881, at 2 (shackles removed for arraignment); *Guiteau in Court,*

Arraignment of the Prisoner, Evening Star, Oct. 14, 1881 (same); *The Day in Court*, Helena Weekly Her., Oct. 18, 1888, at 7 (same); *A Year in Jackson*, Telegram-Herald, Sept. 9, 1890 (same); *Montana News*, Livingston Enter., Aug. 8, 1891, at 4 (same); *James M. Shockley Arraigned Today, Self-Confessed Murderer of Gleason and Brighton Took Statutory Time to Plead*, Deseret Even. News, Jan. 16, 1904, at 2 (same); *Arrainged* [sic] *for the Murder of Policemen*, Semi-Weekly Mess., Mar. 29, 1907, at 3 (same); *Sullivan Arraigned in District Court, Heavily Ironed and Guarded by Four Deputy Sheriffs; Takes Time to Plead*, Salt Lake Trib., Jan. 27, 1908, at 8 (same); *Alleged Bandits in Irons Arraigned on New Bill*, Bee: Omaha, Oct. 12, 1909, at 9 (same); *Try Convict as Murderer*, Salt Lake Trib., Apr. 2, 1911, at 12 (same); *Murderer Warbles Ragtime Melodies*, S.F. Call, Mar. 5, 1912, at 3 (same).[5]

These accounts, the centuries of commentary on the common law, and our "Nation's history, legal traditions, and practices," *Glucksberg*, 521 U.S. at 710, confirm the correctness of the *en banc* majority's holding that there exists "a tradition dating from time out of mind that defendants will appear in court prior to their conviction as free men with their heads held high." Pet.App.28a.

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[5] Copies of these historic newspaper articles are collected in the appendix. Resp.App.9a-23a. All are available through the Library of Congress website, at http://chroniclingamerica.loc.gov/.

Against this evidence that the common law barred shackling during arraignment without a showing of need, petitioner raises a singular objection, that *Deck* examined the all-but-absolute rule against shackling during trial and observed: "Blackstone and other English authorities recognized that the rule did not apply at 'the time of arraignment,' or like proceedings before the judge." 544 U.S. at 626. Petitioner asserts *Deck* meant to say not that the near absolute rule against shackling at trial did not apply at arraignment, but that *no* rule did. That reading is implausible. The very chapter of Blackstone which *Deck* quotes in describing the right to appear free of shackles is titled "Of Arraignment and it's Incidents." And most, if not all, the authorities *Deck* cites expressly describe a right to be free from shackles at arraignment.[6] It is hardly plausible that *Deck* cited these authorities while intending to assert that *no* rule limited shackling at arraignment.

Deck's observation is, of course, dicta. It appears in a case not about the existence of a common law rule limiting shackling at arraignment, but in one deciding whether to extend any rule against shackling to the sentencing phase of a

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[6] Even *King v. Waite*, 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K.B.1743), does not support a rule allowing shackling at arraignment. Records of the proceedings reflect that Waite made no request to be unshackled until his arraignment had finished–he asked not that he appear unbound at arraignment but that he be free of shackles while in prison awaiting trial. *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 03 November 2017), February 1743, trial of John Waite (t17430223-26). For this the court had no authority. And to the extent that *Waite* might be read as to the contrary, it is an aberration.

capital case. Because the statement read literally conflicts with the overwhelming weight of authority, the court of appeals, consistent with this Court's instructions, disregarded it. Pet.App.24a. ("Persuasive Supreme Court dicta are usually heeded by lower courts. But dicta 'ought not to control the judgment in a subsequent suit, when the very point is presented for decision.'") (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (Marshall, C.J.))) (citation omitted).

Aside from this, *Deck* is entirely consistent with and supports the ruling below. *Deck* held that the rule against needless shackling gives "effect to three fundamental legal principles:" the presumption of innocence, the right to present a meaningful defense through counsel, and the need for dignity and decorum throughout criminal proceedings. 544 U.S. at 630-32. Needless non-jury shackling threatens these interests, most directly the dignity and decorum of the courtroom. This dignity reflects the importance of matters committed to the judiciary:

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

Deck, 544 U.S. at 631. It is thus corollary to the presumption of innocence. Pet.App.21a. As one is undermined, so is the other. And as this happens, the

individual's right to present a meaningful defense is sacrificed. Below, the accused, but not convicted, described how shackling humiliated them and discouraged them from coming to court where their families and the public would see them in chains. ER300-01. Beyond these dignitary impacts, shackled defendants were hamstrung in communicating with their counsel, frustrating participation in their own defense. They could not raise their hand to get their lawyers' attention. They could not even write a note. ER251-52; ER756.

The need to protect these interests distinguishes the courtroom from the jail. That is why Petitioner and the dissent are wrong to look to *Bell v. Wolfish*. The deference to security concerns that *Bell* required of courts reviewing prison policies does not fit here. "[I]nstitutional consideration of internal security" is not central to "all other . . . goals" of the courts. *See Bell*, 441 U.S. at 546-47 (citations omitted). Due process is. Providing due process is, indeed, the central mission of courts. Whatever expertise marshals have in providing security, they have none in weighing how chaining a detainee diminishes the presumption of innocence, the right to present a meaningful defense, and the dignity and decorum of the court. Because the *en banc* court was correct to recognize that courts are not prisons and that the common law and the Due Process Clause bar shackling defendants without any showing of need, the case does not merit further review.

III. The decision below does not warrant this Court's review.

Petitioner asserts that the decision below merits this Court's review because its reasoning "cannot be squared with the reasoning of other circuits, and its holding has given rise to a host of serious safety and administrative problems in courts within the Ninth Circuit." Pet.25. Neither assertion is accurate.

Petitioner cites *United States v. Zuber*, 118 F.3d 101 (2d Cir. 1997), and *United States v. LaFond*, 783 F.3d 1216 (11th Cir. 2015), claiming a circuit "split." But neither case considered, let alone approved, a policy whereby no one—not even the marshal—determines that the shackled detainee presents some risk. Rather, *Zuber* and *LaFond* considered claims of error in shackling individual defendants at sentencing. In each case, both the marshal and judge were aware of specific risks posed by the individual defendant.

In *LaFond*, appellant Widdison had been sentenced for his role in a white supremacist prison gang murder of another inmate. The gang's propensity for violence necessitated an anonymous jury. The court, not the marshal, ordered him shackled. Even so, appellant appeared not in five-point restraints. Rather, "his hands remain shackled during his sentencing hearing." *LaFond*, 783 F.3d at 1225.

In *Zuber*, the defendant had fled twice before trial. Judge Cardamone, who disagreed that the in-court shackling was constitutionally permissible absent judicial

inquiry, wrote that had such inquiry occurred, "the information derived would have justified [the shackles]." *Zuber*, 118 F.3d at 105 (Cardamone, J., concurring).

The common law would have allowed shackling of either Widdison or Zuber at sentencing. Those cases are not in conflict with the common law or *Sanchez-Gomez*. There is no "split" and no need for this Court's review.

Petitioner and amici's claims of "serious safety and administrative problems" are equally unfounded. In the five months since the *en banc* court's decision, the Southern District of California has returned to prior practice, shackling only when an individual presents a risk. The sky has not fallen. No incidents of violence or escape have occurred. Groups of defendants are still brought into magistrate courtrooms for mass proceedings. And though the number of prosecutions in the district has approached its 2012 peak, court days do not extend past normal hours.

The Federal Public Defender for the District of Arizona reports much the same result there. Pretrial detainees are no longer shackled without need. Court continues to function well. Operation Streamline, a government initiative to prosecute as many as 70 or more misdemeanor immigration cases in a day, continues as well.

In fact, no Federal Defender in the circuit reports any significant adverse effect from the decision. None reports any incidents of violence or escape by detainees unshackled as a result of the *en banc* decision. None reports court days stretching into the night. Several districts have promulgated new policies addressing

Sanchez-Gomez's due process standard, and Defenders report no problems in implementation. Resp.App.24a-32a.

Amicus Flake contends that, following *Sanchez-Gomez*, a high-risk defendant charged with first-degree murder in state court "was unrestrained".[7] This is incorrect and misleading. The public defender reports that upon request that his client appear unrestrained, the court ordered handcuffs removed but required the defendant to wear a shock belt and leg shackles. This shows a judge making the individualized determination envisioned by *Sanchez-Gomez*.[8] No harm resulted from this.

Flake claims that *Sanchez-Gomez* "will prevent effective border enforcement through programs like Operation Streamline." Flake 13. But he concedes that regular enforcement efforts continue apace. *Id.* at 16 (acknowledging that 58 to 63 guilty pleas a day are still being accepted in Arizona). Flake seeks review to address unsupported and entirely speculative concerns.

The California Sheriffs' amicus equally lacks support. It suggests that detainees would prefer to be fully shackled to protect their own right "to a safe and

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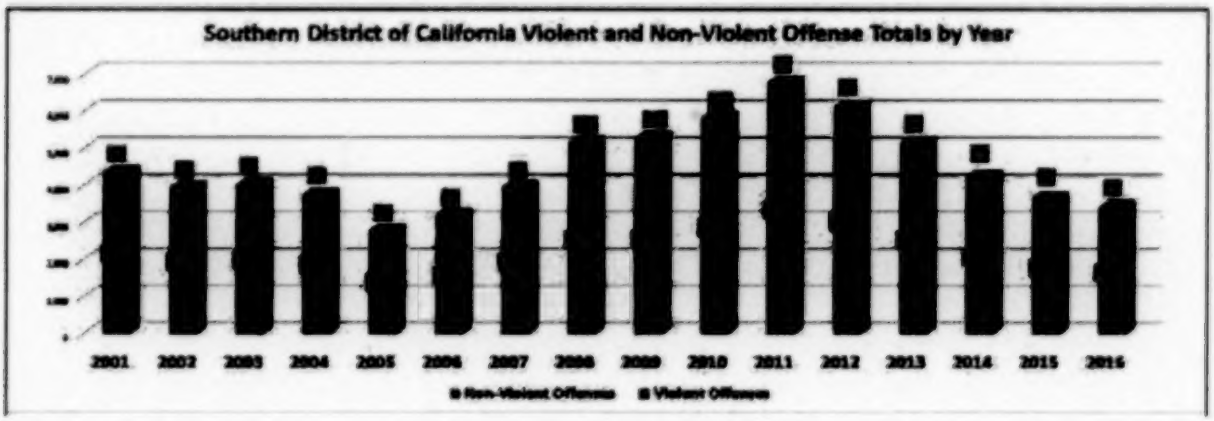
[7] Any citation to state court concerns is premature. See *McDonald v. City of Ill.*, 561 U.S. 742, 765-66 (2010) (interpreting the Fourteenth Amendment to require an individualized determination "selectively incorporating" particular rights applicable to the states).

[8] Upon request from undersigned, Flake identified this case. Flake also described defendants "charg[ing] the bench" in Graham County but failed to identify any such cases.

secure environment in the courtroom." California Sheriffs' 15. And it argues that *Sanchez-Gomez* does not give "sufficient leeway to individual courts to determine their own safety and security needs." *Id.* at 19. The opinion does the opposite: "Courts must decide whether the stated need for security outweighs the infringement on a defendant's right," at least in the courtroom, Pet.App.30a, not marshals or sheriffs. Because neither petitioner nor amici has articulated a documented, practical reason for reviewing this case, certiorari should be denied.

The lack of a record settled by an adversarial evidentiary hearing also makes this a poor vehicle for review. Critical facts claimed to support both the Southern District's need for indiscriminate shackling and Petitioner's need for this Court's review are disputed. Below, respondents disputed the shackling policy was needed. They disputed that the defendant population was increasingly dangerous, that the marshals were particularly burdened by the opening of a second San Diego courthouse building, that there had been any increase in violent incidents in the district, and that any violent incidents that had occurred justified the new indiscriminate policy. Respondents sought discovery, subpoenas, and an evidentiary hearing to resolve these factual disputes. Petitioner successfully opposed all these requests. As a result, there are no findings on any of these critical issues. Pet.App.31a.

Some claims are demonstrably false or misleading. For example, the claim that the defendant population had become increasingly dangerous is belied by statistical evidence available from the Administrative Office of the United States Courts. This evidence shows that between 2001 and 2013, the percentage of the district's defendants charged with violent offenses ranged from 1.1 to 2.4%. In 2013, that percentage was 1.8%.[9]



Similarly, the claim that the opening of the new courthouse had so strained the marshals as to make the policy necessary is unfounded. While a new courthouse opened, the number of courtrooms to be staffed remains the same, and only one marshals' "tank," or central holding cell operates.

As discussed above, respondents also dispute the claims made to justify review—that the decision below has given rise to grave safety and administrative

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[9] Graph compiled from Table D3 for years 2001 through 2016 available at http://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary.

difficulties. This is simply inaccurate. These disputes concerning critical facts display the danger of reviewing a case without a settled record. See generally, Nancy Morawetz, *Convenient Facts:* Nken v. Holder, *the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. Rev. 1600 (2013). Certiorari should be denied.

CONCLUSION

The Southern District's policy of shackling of every pretrial detainee in every non-jury proceeding without evidence that the individual posed any sort of risk presented an extraordinary case. The court of appeals was correct in concluding that challenges to this ongoing policy were not moot and in exercising mandamus jurisdiction. Because overwhelming evidence shows that the common law barred in-court shackling of defendants absent particularized need and that this rule protects the presumption of innocence, the right to meaningful participation in one's own

defense, and the dignity and decorum of the court and the individual, the court of appeals was right in declaring that the policy violates the due process.

Respectfully submitted,

Date: November 13, 2017

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